IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No.

MIDDLETON & CO. (CANADA), LTD., *et al.*,
Petitioners,

—against—

OCEAN DOMINION STEAMSHIP CORPORATION,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Jurisdiction.

This is a suit within the Admiralty and Maritime jurisdiction of the United States and of this Honorable Court. Jurisdiction of this Court is invoked under Article III, Sec. 2, of the Constitution of the United States of America and under Section 240 of the Judicial Code as amended by the Act of Feb. 13, 1925, 43 Stat. 938 (28 U. S. C. Sec. 347).

Statement.

The facts are sufficiently stated in the petition and will not be repeated here.

Specifications of Error.

The United States Circuit Court of Appeals for the Second Circuit erred in the following particulars:

(1) In holding that negligence of a ship's officers, before the commencement of the voyage, in relation to her navigational equipment, does not establish lack of due diligence in relation to seaworthiness but is negligence in management and navigation within the exemptions of Article IV, Subsection (2) [a] of the Hague Rules (Sec. 4 (2) [a] of the United States Carriage of Goods by Sea Act, 46 U. S. C. Sec. 1304, subsection 2(a)).

(2) In holding that a vessel equipped with a defective chart is seaworthy because data is physically on board by which the chart may be corrected, notwithstanding the fact that both the defective condition and the availability of means to correct it are unknown to the vessel's officers.

POINT I.

The exemption from liability for loss resulting from the "act, neglect, or default of the master, mariner, * * * or servants of the carrier * * * in the management of the ship" provided by Article IV, subsection 2 (a), of the Hague Rules* [46 U. S. Code, Sec. 1304, subsection 2 (a)] does not free the carrier from liability "for loss or damage resulting from" negligence of the ship's officers, before commencement of the voyage, in properly preparing the vessel for the voyage.

In the accompanying petition (at pp. 11-12) we have quoted from the opinion of this Court in *Int. Nav. Co.* v.

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* The provisions of the Hague Rules applicable to this case, are set out in the Appendix.

Farr & Bailey Mfg. Co., 181 U. S. 218; and (at pp. 14-15) from the opinion of the Circuit Court of Appeals for the Fourth Circuit in *The Maria*, 91 F. (2d) 819. In both cases Section 3 of the Harter Act was involved.

At page 10 of the petition we have cited the English decisions holding that the provision of the Hague Rules exempting a carrier from liability for negligence of a ship's officers "in the management of the ship", was borrowed from Section 3 of our Harter Act (46 U. S. Code, Sec. 192)* and is to be construed according to the interpretation previously given to the provision of the Harter Act exonerating a shipowner from liability "for damage or loss resulting from faults or errors in navigation or in the management of said vessel". In *Gosse Millerd* v. *Canadian Govt. Merchant Marine*, (1929) A. C. 223, after pointing out that the phrase "management of the ship" appearing in the Hague Rules, was taken from the Harter Act, Lord Hailsham went on to say (at p. 230):

> "I am unable to find any reason for supposing that the words as used by the Legislature in the Act of 1924 have any different meaning to that which has been judicially assigned to them when used in contracts for the carriage of goods by sea before that date; * * *."

Viscount Sumner, in his concurring opinion, also adverted to the fact that the Legislature, in using the phrase in question, must be deemed to have been aware of the judicial construction previously given those words and to have confirmed it ((1929) A. C. at p. 238). The dissenting opinion of Greer, *L. J.*, in the court below, was specifically approved by the House of Lords (at p. 236). Judge Greer said ((1928) 1 K. B. at p. 743):

> "It was felt by a large number of shipowners,

* The provisions of Section 3 of the Harter Act are set out in the Appendix.

> merchants, and bankers in this and other countries that it was desirable to make the laws of the countries interested in international trade as nearly as possible uniform with regard to the matters dealt with by the Harter Act * * * and any decision of our Courts as to its meaning is an authority which can be properly applied to the similar exception clause in the Carriage of Goods by Sea Act, 1924."

The statement of the Circuit Court of Appeals (Rec., p. 758):

> "We know of no decision where the neglect of the ship's officers to perform the routine labor of examining mariners' notices so as to bring navigation charts up to date and make them safe for navigation has been imputed to the owner"

is squarely contrary to the principle of the decision of the Circuit Court of Appeals for the Fourth Circuit in *The Maria, supra,* which is considered at some length in the accompanying petition (at pp. 14-15).

In *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*), a routine inspection by the ship's officers of the port-hole covers at any time during the voyage would have disclosed that they were not made fast, yet this Court held that the vessel was unseaworthy.

In *Dobell & Co.* v. *S. S. Rossmore Co.*, (1895) 2 Q. B. 408, the vessel sailed with a port improperly caulked by reason of the negligence of the ship's carpenter who was admittedly a competent person. In respect of the resultant damage to cargo the carrier sought exoneration under a bill of lading exception which paraphrased the wording of Section 3 of the Harter Act and also provided that the shipment was (p. 409) "subject to all the terms and provisions of, and all the exceptions from liability contained in" that Act. The English Court of

Appeal overruled this defense and found in favor of the cargo owner on the ground that the exception of faults or errors in the management of the ship related only to negligence after sailing and not to a prior neglect which affected the seaworthiness of the vessel for the contemplated voyage.

In *The Newport*, 7 F. (2d) 452 (C. C. A. 9), ten minutes before the vessel got under way, the third assistant engineer received an order to turn steam into the after capstan preparatory to taking in the lines on leaving the pier. By mistake he turned a valve which admitted steam into a cargo hold through the smothering system and cargo stowed in that hold was damaged. The court held that the engineer's negligence was not a fault or error in management within the meaning of Section 3 of the Harter Act but that his act rendered the vessel unseaworthy for the voyage.

In *S. S. Wellesley Co.* v. *Hooper & Co.*, 185 Fed. 733 (C. C. A. 9), the court ruled that the carrier was not freed from liability under Section 3 of the Harter Act for loss of cargo caused by the negligence of the vessel's officers in permitting her to settle on the bottom during loading and list until her deck cargo fell overboard, since "the language of section 3 of the Harter Act clearly contemplates a distinction between the preparation for a voyage and the management of the same after it is begun * * *" (at p. 738).

In *Gilchrist Transp. Co.* v. *Boston Ins. Co.*, 223 Fed. 716 (C. C. A. 6), after a vessel's cargo had been loaded, she was moved out into the harbor and made fast to another vessel to await the opening of navigation. It was found that the master was negligent in not placing the vessel under steam when warned of an approaching storm; and

in not separating her from the vessel to which she was made fast when both were driven across the harbor by the storm. The Circuit Court of Appeals for the Sixth Circuit held that Section 3 of the Harter Act afforded no protection to the shipowner since the master's negligence in management occurred before the commencement of the voyage.

Construction of 46 U. S. Code, Section 1304, Subsection 2 (a) (Article IV, Subsection 2 (a) of the Hague Rules), was involved in *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp.*, 32 F. Supp. 520 (E. D. Mich.). There the cargo was damaged by leakage of water from a pipe which the court found "froze while the cargo was being loaded" (p. 529). The court also found (at p. 529) that the carrier "relied on the master and the officers of the ship" to see that she was in proper condition; that so far as the master was concerned "it never occurred to him to do anything" about the piping; and that the mate "gave no thought to the possibility of the water line freezing". The court said (p. 531):

> "admitting that the officers of the ship were negligent, (the carrier) contends that their negligence was fault or neglect in the management of the ship for which it is exempt under the provisions of Section 1304 (2) (a). The basis of this contention is that the main water line was provided with a shut off valve in the engine room and that the officers could have closed this valve and thereby have avoided the danger of the line freezing and the water entering the cargo."

The court overruled this contention on the ground that Congress intended the words, "management of the ship" in the Carriage of Goods by Sea Act, "to have the same meaning as that assigned to them in the long line of decisions construing these words as used in the Harter Act"

(p. 530) and that the negligence in the case did not relate to management of the ship during the voyage, but rather to her seaworthiness. The court further ruled (p. 532):

> "I hold that under the 1936 Act, where unseaworthiness of the vessel, caused by the failure of the carrier to exercise due diligence, and negligence in the management of the ship concur in causing the loss, the carrier is liable for the loss, * * * Under these conditions, even though the failure to shut off the main water line in the engine room was negligence in the management of the ship, which I have found it was not, respondent would still be liable, inasmuch as unseaworthiness resulting from the failure of the carrier to exercise due diligence and negligence in the management of the ship concurred in causing the loss."

In the instant case the basic negligence of the officers of the "Iristo" consisted in their assumption, at the time when they were preparing for this voyage to Bermuda, that the chart which the master secured for the vessel's navigation at that place was correct and up-to-date although it showed on its face that it was not. Petitioners submit that this negligence does not come within the exemption from liability granted the carrier under Article IV, subsection 2 (a), of the Hague Rules (46 U. S. Code, Sec. 1304, subsection 2 (a)) and that the ruling herein by the Circuit Court of Appeals for the Second Circuit that the "Iristo" was seaworthy and the carrier entitled to the benefit of the foregoing exception, conflicts with both the American and British authorities on the subject.

POINT II.

The ruling of the Circuit Court of Appeals that a vessel equipped with a defective chart is seaworthy because data is physically on board by which the chart may be corrected, although the ship's officers do not know either that the data is on board or that the chart requires correction, is contrary to the principle adopted by this Court, by the British House of Lords, and by the Circuit Court of Appeals for the Second Circuit itself when differently constituted.

In *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*), this Court considered a case where cargo sustained damage as the result of the entry of sea water through a port hole. This Court pointed out that the iron covers over the ports:

> "were intended to be securely closed before any cargo was received; the person whose duty it was to close them or see that they were closed, supposed that that had been properly done; and the hatches were battened down with no expectation that any more attention would be given to the port covers during the voyage; but in fact the port was not securely covered, and there was apparently nothing to prevent the influx of water * * *." (181 U. S., at p. 224.)

This Court found that the ignorance of the ship's officers that the iron covers were open and the absence of any intention to make any examination of them during the course of the voyage, rendered the vessel unseaworthy. This Court quoted with approval the distinction between the principle of that case and the case of *The Silvia*, 171 U. S. 462, which had been drawn by the Circuit Court of Appeals for the Third Circuit (181 U. S. at pp. 226-7):

> "'But in the present case the port in question was

not designedly left open, and its shutters ought not to have been left unfastened. They would not "usually be left open for the admission of light", or for any purpose. They were believed by all concerned to have been securely closed, and that they would remain so throughout the voyage. *It was neither intended nor expected that they would require or receive any attention at sea. It was not supposed that any control of them in the course of navigation and management would be necessary,* and no duty to exercise control existed, simply because no need nor occasion for it could have been foreseen or perceived.'" (Italics ours.)

In *The Silvia* (*supra*) the facts were strikingly similar to those in *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*) with one exception. In *The Silvia*, also, the vessel sailed with porthole covers unfastened at a point where they could readily be reached and made secure and cargo thereby sustained damage; but in that case the porthole covers were designedly left open when the vessel sailed and the ship's officers planned to close them when the weather required it; but when heavy weather was encountered, it was forgotten that the porthole covers were not made fast.

In the present case, the Circuit Court of Appeals relied in large part upon its decision in *U. S. Steel Products Co.* v. *Amer. & Fgn. Ins. Co.*, 82 F. (2d) 752. In discussing that case the court said that the "very point" of the present case was there decided (Rec., p. 758). In *U. S. Steel Prod. Co.* v. *Amer. & Fgn. Ins. Co.*, the S. S. "Steel Scientist" stranded because the chart had not been corrected to show the position of a new lighthouse. In the vessel's chartroom were a Light List with supplement, Sailing Directions and a Notice to Mariners, each of which gave full information concerning the existence and char-

acteristics of the new light. The ship's second officer, in charge of the navigational equipment, knew of the existence of the light before the vessel sailed on her voyage; he placed a check-mark beside the entry in relation to it in the Light List Supplement and he planned to correct the chart during the course of the voyage before arriving near the light, to show its position. He negligently omitted doing so and another officer was on watch when the ship was navigated with relation to the light. It was held that seaworthiness did not require that the chart be corrected before the commencement of the voyage; and that the stranding resulted from negligence in management of the vessel because of the failure of the Second Officer to correct the chart before approaching the light, as intended at the start of the voyage; and that the vessel owner had exercised due diligence to make the vessel seaworthy and properly equipped since it furnished the officers with ample data which was readily available on board, giving full information concerning the new light by which the chart might have been corrected.

If the officers of the "Iristo" had known that there were Notices to Mariners on board which required examination in relation to Bermuda and it had been intended to examine them during the course of the voyage and make such correction of the chart as the Notices called for, the case might be considered comparable to *U. S. Steel Prod. Co.* v. *Amer. & Fgn. Ins. Co.* and within the ruling of this Court in *The Silvia* (*supra*). In holding that the physical existence on the "Iristo" of means to correct the chart brought the present case within the principle of *U. S. Steel Prod. Co.* v. *Amer. & Fgn. Ins. Co.*, the Circuit Court of Appeals must have considered irrelevant both the fact that the ship's officers were ignorant that there was any data on board which called for correction of the chart and also the fact that they intended from the

start to rely upon the defective chart. Therefore, it did not draw the distinction in principle which this Court did in *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*).

In dealing with petitioners' argument in relation to *The Silvia* (*supra*) and *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*), the Circuit Court of Appeals said (Rec., p. 759):

> "Scrutton, *L. J.*, whose judgment in a field like the present is of special weight, laid down the correct rule in *Madras Electrical Supply Co.* v. *P. & O. Steam Nav. Co.*, 18 Ll. List L. R. 93, as follows:
>
> > 'As I understand the authorities, a ship is not unseaworthy where the defect is such that it can be remedied on the spot and in a short time by materials available. The common case is a ship with an open port-hole. If the port-hole is a place where you can shut it at once, a ship is not unseaworthy because her port-hole happens to be open. If the port-hole is in a place where you cannot get at it during the voyage, and it is open, then the ship is unseaworthy. In the same way, I absolutely decline to hold that a ship is unseaworthy because there being the materials on board to be used for the purpose for which seaworthiness is required, the officers of the ship do not use the materials which are available.'
>
> The reasoning of Scrutton, *L. J.*, applies to the present case and reconciles any supposed differences between the decisions of *The Silvia*, 171 U. S. 462, and *Int. Navigation* v. *Farr*, 181 U. S. 218."

The petitioners find themselves unable to understand what the Circuit Court of Appeals had in mind when it referred to "supposed differences" between the decisions of this Court in the two cases mentioned: in *The Silvia*,

this Court held that the carrier was not liable and in *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* that it was liable; and the only difference between the facts of the two cases was that in the former it was known that the port hole covers were open and it was meant to secure them during the voyage, while in the latter, although the port holes could be readily reached and the covers made fast during the course of the voyage, it was not done because the ship's officers assumed that they had been made fast before the voyage commenced and, therefore, assumed that they needed no examination.

In *Madras Electrical Supply Co.* v. *P. & O. Steam Nav. Co.* (*supra*), to which the Circuit Court of Appeals referred, a heavy piece of cargo was damaged during the course of discharge because of the breakage of one of the derrick guy ropes. The cargo owner urged that in view of the weight of the cargo, an emergency preventer guy should have been fitted. There was ample rope available on board from which a preventer guy could have been constructed, but the master negligently determined not to fit one. It was held that as the master chose not to use available material to construct an emergency preventer guy, the accident resulted from negligence in management and not from unseaworthiness.

We submit that the facts of that case bring it within the principle of *The Silvia* (*supra*) rather than of *Int. Nav. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*): the ship's officers had full knowledge of how to fit a preventer guy and knew that there was rope available for one. We have no doubt that this Court or any other American court would reach the same decision as did the English Court of Appeal.

In *The Lady Pike*, 21 Wall. 1, at pp. 14-15, this Court long ago pointed out that to be seaworthy a ship must

be manned "with a crew adequate in number and competent for their duty with reference to all the exigencies of the intended route". See also:

Tait v. *Levi*, 104 Eng. Reprints 686;
The Rolph, 299 Fed. 52, at p. 54 (C. C. A. 9);
Northern Commercial Co. v. *Lindblom*, 162 Fed. 250, 254 (C. C. A. 9).

In *The Schwan*, (1909) A. C. 450, sea water entered a vessel and damaged cargo because of faulty manipulation by the engineers of an unusual type of 3-way cock fitted to a certain pipe line, the ship's officers being ignorant of the characteristics of this cock. In holding the carrier liable Lord Atkinson held (p. 454):

> "And it certainly would appear to me that a due regard for the safety of the ship and cargo would have imperatively demanded that every member of the crew likely to use this cock, or interfere with it, should, before the voyage commenced, have been fully instructed as to its proper use and fully informed as to the danger to be avoided; since the best machinery may become a source of danger if placed under the control of the ignorant or unskilled, and the best equipped ship may become unseaworthy if her crew are unacquainted with the nature, structure, and proper use of the appliances with which she is furnished.
>
> "In my view it is therefore clear that this ship, equipped as she was, and manned by the crew she carried, was, at the time she was loaded, in fact unseaworthy."

The other Law Lords wrote opinions containing similar views.

In the accompanying petition (at p. 7) we pointed out that while there were two Notices to Mariners physically

on board the "Iristo" which gave data in relation to the wreck of the "Cristobal Colon", one was in a bundle in the master's dining saloon which he alone used, and was not available for examination by any of the ship's watch officers; and the other was in a drawer of the chartroom table with a large pile of other Notices; and that none of the officers knew that there was any data in any Notice in relation to Bermuda. The Circuit Court of Appeals cited the physical existence on the vessel of *both* Notices to Mariners as proof of the ship's seaworthiness (Rec., pp. 754, 758, 759).

The officer on watch at the time of the stranding was ignorant that there were any Notices to Mariners on the vessel except some old Norwegian Notices which were on board when he joined her a year before (Rec., pp. 520-1), and which, of course were issued long before the stranding of the "Cristobal Colon".

Accordingly, it is clear that if the rule adopted by the House of Lords in *The Schwan* is applied, it cannot be said that "every member of the crew likely to use" the chart was informed that there was data on board from which it could be brought up to date. The admitted facts are that none of the officers knew that there was any data in any Notice to Mariners on board with respect to the approaches to Bermuda; and the officer actually on watch at the time of the stranding did not even know that there were any recent Notices to Mariners on the vessel. Furthermore, the officers who knew of the recent Notices to Mariners conceded frankly that they had no intention of consulting them, as they were proceeding on the assumption that the chart was up to date.

In *Standard Oil Co. of N. Y.* v. *Clan Line Steamers, Ltd.*, (1924) A. C. 100, a ship was so constructed that when loaded with homogeneous cargo she was unstable unless

the ballast tanks were full. The master was ignorant of this quality of his vessel and when she was loaded with homogeneous cargo he pumped out his tanks and the vessel capsized. In the course of his opinion holding the vessel owner liable for the loss of the cargo, Lord Atkinson said (at p. 120):

> "It is not disputed, I think, that a ship may be rendered unseaworthy by the inefficiency of the master who commands her. Does not that principle apply where the master's inefficiency consists, whatever his general efficiency may be, in his ignorance as to how his ship may, owing to the peculiarities of her structure, behave in circumstances likely to be met with on an ordinary ocean voyage? There cannot be any difference in principle, I think, between disabling want of skill and disabling want of knowledge. Each equally renders the master unfit and unqualified to command, and therefore makes the ship he commands unseaworthy."

In discussing *Standard Oil Co. of N. Y.* v. *Clan Line Steamers, Ltd.* (*supra*), the Circuit Court of Appeals commented (Rec., p. 759) that the House of Lords held:

> "that the neglect of the owner to give the master the necessary information, with the resultant loss, rendered the owner responsible. The fault was plainly that of the owner, while here the master was supplied with everything necessary for navigation and only his neglect caused the accident."

In the *Clan Line* case, the owner's personal negligence became material because it withheld from the master information which it had concerning the necessity for keeping the ballast tanks full and the master was in no position to learn this for himself; the master's ignorance was not the result of his own negligence. Also, this question was considered in connection with the owner's

petition for limitation of liability. None of the Law Lords suggested that if the master's ignorance of the qualities of his ship had resulted from his own negligence in not making inquiry or tests before sailing, the negligence would relate to management rather than to seaworthiness.

The Circuit Court of Appeals said, in discussing one of its own prior decisions (Rec., p. 758):

> "The statement of L. Hand, *J.*, in *The Elkton*, 49 F. (2d) 700, 701, that 'unseaworthiness may depend upon the knowledge of the ship's company as to how far she has been in fact made ready' related to the case of a hidden and broken vent pipe through which fuel oil leaked from a tank and damaged a cargo of sugar. Knowledge of the defect which existed when the vessel sailed was held not to render the (fol. 761) vessel seaworthy. We know of no decision where the neglect of the ship's officers to perform the routine labor of examining mariners' notices so as to bring navigation charts up to date and make them safe for navigation has been imputed to the owner."

From its discussion of the three cases last mentioned, it is apparent that the Circuit Court of Appeals considered that ignorance of a ship's officers of the unreliability of their navigational equipment stands on a different footing from their ignorance of the unreliability or unusual characteristics of their ship's hull and fittings. Also, the Circuit Court of Appeals thought that before a vessel can be considered unseaworthy as the result of the ignorance of her officers, it must appear that that ignorance resulted from the vessel owner's personal negligence.

Petitioners submit that whether the ignorance of a vessel's officers results from their own negligence or from that of the vessel owner, the same principle is applicable.

Indeed, that was the very point determined by this Court in *Int. Mfg. Co.* v. *Farr & Bailey Mfg. Co.* (*supra*) and by the English Court of Appeal in *Dobell & Co.* v. *Steamship Rossmore Co.* (*supra*).

CONCLUSION.

Petitioners respectfully submit that a writ of certiorari should be granted to review the decision of the United States Circuit Court of Appeals for the Second Circuit because of the importance of the questions presented, involving interpretation of the Hague Rules adopted in many countries as the result of an international convention; because the decision in the present case is directly contrary to the settled law of the Fourth, Sixth and Ninth Circuits; and because the decision is in conflict with the decisions of this Court and of the British courts.

Respectfully submitted,

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EZRA G. BENEDICT FOX,
Counsel for Petitioners.

Dated, New York, N. Y., November 30, 1943.

APPENDIX.

Hague Rules, Article III, subsection 1; Canadian Water Carriage of Goods Act, Article III 1;* United States Carriage of Goods by Sea Act, Section 3 (1), (46 U. S. Code, Sec. 1303, subsection 1).

"1. The carrier shall be bound before and at the beginning of the voyage, to exercise due diligence to,

(a) make the ship seaworthy;

(b) properly man, equip, and supply the ship;

(c) make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage and preservation."

Hague Rules, Article IV, subsection 2 (a); Canadian Water Carriage of Goods Act, Article IV 2 (a); United States Carriage of Goods by Sea Act, Section 4 (2) (a), (46 U. S. Code, Sec. 1304, subsection 2 (a)).

"2. Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from,

(a) act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship; * * *"

Harter Act, Section 3 (46 U. S. Code, Sec. 192).

"That if the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers

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* The Canadian Water Carriage of Goods Act is printed in full at pp. 643-653 of the record.

shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service."